

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
HILARION CANO	:	
for Revision of a Determination or for Refund of	:	DETERMINATION
Cigarette Tax under Article 20 of the Tax Law for the	:	DTA NOS. 817570
Period March 13, 1997.	:	AND 817571

In the Matter of the Petition	:
of	:
TAVERAS SANTOS	:
for Revision of a Determination or for Refund of	:
Cigarette Tax under Article 20 of the Tax Law for the	:
Period March 13, 1997.	:

Petitioner, Hilarion Cano, 3249 93rd Street, East Elmhurst, New York 11369-2451, filed a petition for revision of a determination or for refund of cigarette tax under Article 20 of the Tax Law for the period March 13, 1997. Petitioner, Taveras Santos, 3150 85th Street, Jackson Heights, New York 11370-1929, also filed a petition for revision of a determination or for refund of cigarette tax under Article 20 of the Tax Law for the period March 13, 1997.

A consolidated hearing was held before Roberta Moseley Nero, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York on October 31, 2000 at 10:30 A.M., with all briefs to be submitted by April 27, 2001, which date began the six-month period for the issuance of this determination.

On December 4, 2000, Chief Administrative Law Judge Andrew F. Marchese advised the parties of the assignment of Administrative Law Judge Frank W. Barrie to these matters because of Judge Mosely Nero's departure from employment at the Division of Tax Appeals.

Petitioners appeared by James R. Grimaldi, Esq. The Division of Taxation appeared by Barbara G. Billet, Esq. (Clifford M. Peterson, Esq., of counsel).

ISSUES

I. Whether petitioners were persons in possession of or had control of unlawfully stamped cigarettes.

II. Whether the penalties imposed were excessive.

FINDINGS OF FACT

1. The Petroleum, Alcohol and Tobacco Bureau of the Division of Taxation ("Division") received an anonymous tip that a counterfeiting operation, involved in the production of bogus cigarette tax stamps, was going to be moved at some unspecified time on Thursday, March 13, 1997 from its location at 131-20 95th Avenue, an address in South Queens not far from the Brooklyn borough line. Byron Mars ("Investigator Mars"), a senior investigator with experience in approximately 200 investigations of counterfeit cigarette tax stamps, was assigned to conduct a stakeout of this location in South Queens. No specific person was the target of the stakeout.

2. Elsa Guzman and Ramon O. Moronta, the owners of the two-family house under surveillance, had rented the basement apartment to Francisco and Mercedes Ramirez. Elsa Guzman lived in the other apartment located on the premises staked out by Investigator Mars. She did not know either one of the petitioners on the date at issue.

3. Arriving at approximately 10:00 A.M. on March 13, 1997, Investigator Mars, who was assisted by various other investigators in the course of the stakeout, did not actually see anyone,

in his words, “going to” the premises until about 8:15 P.M. (tr., p. 17). At that time, he observed petitioners arrive on the scene in a GMC Safari truck. This vehicle had been rented by petitioner Cano from National Car Rental. Because the law allows law enforcement to seize vehicles used to commit crimes, according to the investigator, in “over 95 percent of the cases involv[ing] vehicle and cigarettes transportation, the vehicle is rented”(tr., p. 50). In that way, the vehicle would be returned to the rental company as owner and not seized by law enforcement. Petitioner Cano was cagey and nonresponsive in answering questions concerning his rental of the truck:

Attorney Peterson: You rented the van?

Hilarion Cano: Yeah.

Attorney Peterson: Okay. And how far in advance of the evening of March 13th did you rent the van?

Hilarion Cano: How what?

Attorney Peterson: Did you rent the van that same day?

Hilarion Cano: No, I rent the van before that, sir. I don’t recall the date, but it was before that.

Attorney Peterson: Okay. And do you recall how much the rental of the van was?

Hilarion Cano: No, I don’t remember exactly, it was like 330 something for the week or something.

Attorney Peterson: So you rented it for the week?

Halarion Cano: I don’t recall. I don’t have the receipt.

4. Investigator Mars observed petitioners, the two occupants of the truck, pull up in reverse to the mouth of the driveway for the two-family house which he had staked out. After opening the gate to the driveway, the truck was backed up to the side of the house. The investigator described what he then saw as follows:

[Petitioners] went into the basement of the house from some doors, Bilko doors that were there. They went downstairs, and from a glass window, a small glass window, I observe that they were loading half cases of cigarettes into black garbage bags. (Tr., p. 20.)

5. Although the investigator was too far away from the Bilko doors to see how the petitioners “first entered” the basement through these doors and was also unable to see anyone else through the small basement window, he believed that another person was in the basement. According to Investigator Mars, the Bilko doors were locked from the inside and someone had to unlock them to permit petitioners to enter. In addition, the investigator in the course of the stakeout, “mainly was focused on the . . . entrance to the basement” and conceded that “people could have gone in and out without anyone noticing” through the front door of the two-family house (tr., p. 54).

6. The investigator’s belief that someone else was in the basement was confirmed by petitioner Cano. Mr. Cano contends that he and petitioner Santos¹ went to the location under surveillance to purchase cigarettes from an individual named Elvio Monegro. According to Mr. Cano, Mr. Monegro and another unidentified man were in the basement when they were allowed entrance through the Bilko doors. Mr. Cano maintains that he later heard from an unidentified “somebody else” that during the search of the basement by the Division’s investigators, pursuant to a search warrant in the early hours of the following day, Mr. Monegro hid on the second floor of the two-family house. Elvio Monegro’s name also appeared on a “Data Worksheet” pre-printed form, prepared by an

¹ Petitioner Taveras Santos was not present in person at the hearing. According to Mr. Cano, he was in Santo Domingo in the Dominican Republic. Mr. Cano testified that the actual name of his co-petitioner (who is also his brother-in-law since Mr. Cano is married to his sister) is Juan Santos Taveras. Petitioner Cano also noted that Juan Santos Taveras is also known as Juan Francisco Santos Taveras and that “everybody knows him as a Pancho” (tr., p. 126). Nonetheless, since the petition filed is in the name of Taveras Santos, the caption of this determination reads as such.

unidentified Division employee a few days after the stakeout and arrest of petitioners.

Investigator Mars explained why Mr. Monegro's name appeared as a target of the investigation, in addition to each of the petitioners, on this form as follows:

The explanation given by the person who prepared this is that while he was in the neighborhood, there was a Ryder truck . . . he thought that might have been the person being used to transport the cigarettes, he ran the plate and it came back that [the truck] was rented to [Elvio Monegro]. (Tr., p. 81.)

7. After gaining access to the basement of the building under surveillance, petitioners made approximately 10 trips from the basement to the rented truck in the course of the next 15 minutes loading black plastic bags full of half cases² of cigarettes, filling the truck to near capacity. Petitioners then left the scene in their rented truck, and a minute or two later, when they were approximately one block away, petitioners were stopped by Division investigators. An inspection of the truck revealed 329 cartons (or 3,290 packs since there are 10 packs to a carton of cigarettes) of assorted cigarettes all bearing counterfeit New York State and City cigarette tax stamps. A property release and receipt form itemized the 329 cartons of cigarettes found in the van as follows:

Quantity	Item
149 cartons	Marlboro cigarettes with counterfeit stamps
85 cartons	Newport cigarettes with counterfeit stamps
6 cartons	Kent cigarettes with counterfeit stamps
18 cartons	Parliament cigarettes with counterfeit stamps
16 cartons	Winston cigarettes with counterfeit stamps
10 cartons	Kool cigarettes with counterfeit stamps

² Half cases contain 30 cartons of cigarettes.

30 cartons	Salem cigarettes with counterfeit stamps
14 cartons	Pall Mall cigarettes with counterfeit stamps
1 carton	Benson & Hedges cigarettes with counterfeit stamps

8. Petitioners had no purchase documentation for the 329 cartons of cigarettes in their rented van. Nonetheless, petitioner Cano stated, at the time he was stopped by the investigators, that he had “purchased” the cigarettes for \$19.00 a carton, an amount less than the fixed legitimate wholesale price of \$20.40, from an unnamed male in the basement of 131-20 95th Ave. Petitioners were arrested and taken to the local police precinct.

9. Division investigators returned to the premises which had been staked out and attempted to gain entrance by way of the Bilko doors and by way of a stairwell door on the first floor landing, approximately 16 feet from the front door. Although the lights were on in the basement apartment as seen through gaps in the stair landing door and two basement windows, nobody answered repeated knocks and requests for entrance. With investigators stationed at the two exits from the basement, a search warrant was sought and obtained in the early hours of March 14, 1997. The search warrant was executed at approximately 4:30 A.M., and the investigators found materials for a counterfeiting operation, including several gallons of glue, several gallons of stripper, masks, four boxes of Brillo, goggles, brushes and four hand-held irons used to apply stamps to packs of cigarettes, as well as over 96,000 counterfeit New York State and City tax stamps. The investigators counted 645 full sheets of 150 counterfeit cigarette tax stamps or 96,750 counterfeit stamps and 41 partial sheets of counterfeit cigarette tax stamps.³ On

³ At some later date, the counterfeit stamps were recounted and the number of full sheets was reduced by 16, from 645 to 629, and partial sheets increased by 16 from 41 to 57. Since the full sheets contained 94,350 stamps, and it appears that the partial sheets had 5,274 stamps, the total number of counterfeit stamps found in the basement by the investigators was 99,724 representing a dollar value of \$69,806.80 (70 cents multiplied by 99,724).

the date at issue, each stamp was worth 70 cents so that the value of 96,750 stamps was \$67,725.00. In addition, the investigators found over a thousand cartons of cigarettes with counterfeit New York State and City tax stamps. These cartons of cigarettes were itemized on a property receipt and release form as follows:

Quantity	Item
147.0 cartons	Benson & Hedges cigarettes bearing counterfeit stamps
118.0 cartons	Virginia Slims cigarettes bearing counterfeit stamps
151.0 cartons	Salem cigarettes bearing counterfeit stamps
64.0 cartons	Kent cigarettes bearing counterfeit stamps
116.0 cartons	Parliament cigarettes bearing counterfeit stamps
2.0 cartons	Pall mall cigarettes bearing counterfeit stamps
62.2 cartons	Newport cigarettes bearing counterfeit stamps
86.0 cartons	Kool cigarettes bearing counterfeit stamps
160.5 cartons	Marlboro cigarettes bearing counterfeit stamps
132.8 cartons	Winston cigarettes bearing counterfeit stamps
Total: 1,039.5 cartons (or 10,395 packs of cigarettes)	

10. The counterfeit stamps seized by the investigators were lettered and numbered either “Y7343” or “Y7443”. Counterfeit stamps with either of these two designations were seen by Investigator Mars throughout New York City on a daily basis: “Those stamps were well known, prevalent in the New York City area, and almost daily I was encountering them at that particular time (tr., p. 22).”

11. The arrests of petitioners would ultimately culminate in plea bargains whereby each petitioner pleaded guilty to Penal Law § 170.20, Criminal possession of a forged instrument in the third degree, which provides as follows:

A person is guilty of criminal possession of a forged instrument in the third degree when, with knowledge that it is forged and with intent to defraud, deceive or injure another, he utters⁴ or possesses a forged instrument.

Criminal possession of a forged instrument in the third degree is a class A misdemeanor.

At the plea allocution on May 23, 1997 in Criminal Court of The City of New York, County of Queens, before Judge S. Parker, each of the petitioners was represented by an attorney.

Petitioners conceded that the following charge was “true”:

It is charged that on March 13th, 1997 at 8:30 in the evening at 121-30 95 Avenue in Queens county, that each of you together were in possession of counterfeit New York State tax stamps.

Although Judge Parker was prepared to impose a \$500.00 fine on each of the petitioners, Mr. Cano agreed to pay \$1,000.00 so that no fine would be imposed upon Mr. Santos, which was acceptable to the judge. Consequently, a fine of \$1,000.00 was imposed upon Mr. Cano and no fine upon Mr. Santos. After his arrest, Mr. Cano had been contacted by Elvio Monegro who told him “that he was going to pay for all the things that happened . . .”(tr., pp. 105-106).

12. A separate Notice of Determination dated July 13, 1998 was issued to each of the petitioners. Each notice asserted penalty due of \$147,300.00 under Article 20 of the Tax Law for the tax period ended March 1, 1997 because “during an inspection of your premises, you were

⁴ The term “utter” is defined in Black’s Law Dictionary 1387 [5th ed 1979] as follows:
To put or send (as a forged check) into circulation; to publish or put forth; to offer. To utter and publish an instrument, as a counterfeit note, is to declare or assert, directly or indirectly, by words or actions, that it is good; uttering it is a declaration that it is good, with an intention or offer to pass it. To utter, as used in a statute against forgery and counterfeiting, means to offer, whether accepted or not, a forged instrument, with the representation, by words or actions, that the same is genuine.

found to be in possession of unstamped or unlawfully stamped cigarettes, and/or untaxed tobacco products.”

SUMMARY OF THE PARTIES’ POSITIONS

13. Petitioners maintain that they were not in possession and control of the cigarettes with counterfeit stamps or with no stamps which were discovered inside the basement apartment under surveillance by the Division’s investigators. According to petitioners, other individuals had access to the basement apartment and suggest that the evidence points to Elvio Monegro as the individual in possession and control of the contraband cigarettes in the basement apartment. Petitioners contend that their guilty pleas in the criminal matters do not collaterally estop them from challenging the imposition of the civil penalties at issue. Petitioners also complain that the Division failed to consider any mitigating circumstances when it imposed the maximum civil penalties. In addition, petitioners maintain that the Division “calculated the penalty based upon an unsupported amount of cartons of cigarettes” (Petitioners’ brief, p. 14). As a result, petitioners argue that the Division failed to establish a rational basis for the maximum penalties imposed. Finally, petitioners contend that the statutory notices issued against them were defective by referencing the period ending March 1, 1997 instead of March 13, 1997.

14. According to the Division, petitioners pleaded guilty to possession of the cartons of cigarettes, to which counterfeit tax stamps were affixed, found in the basement of 131-20 95th Avenue. Therefore, the Division counters that “the petitioners are collaterally estopped from challenging the imposition of the subject penalties for the illegally stamped cigarettes found in the basement of the house” (Division’s brief, p. 9). Further, the Division maintains that any number of persons may be found to be in possession or control of the illegally stamped cigarettes, and that the imposition of penalty is not limited to an individual or individuals who were “the sole

possessors or controllers of the illegally stamped cigarettes” (Division’s brief, p. 15). The Division rejects petitioners’ evidence as unreliable and as a result they failed to shoulder their “burden of proof to demonstrate with clear and convincing evidence that they were not in possession or control of the illegally stamped cigarettes in the basement” (Division’s brief, p. 17). The Division maintains that maximum penalties were warranted given that “[t]his counterfeit operation was one of the most serious counterfeit tax stamp operations at that time,” and petitioners were uncooperative with the investigators (Division’s brief, p. 40). Finally, the Division argues that the error regarding the date on the statutory notices is not sufficient to invalidate the notices given the lack of any resulting harm or prejudice to the petitioners.

CONCLUSIONS OF LAW

A. Tax Law § 481(1)(b) provides in relevant part as follows:

In addition to any other penalty imposed by this article, the commissioner of taxation and finance may impose a penalty of not more than one hundred dollars for each two hundred cigarettes or fraction thereof in excess of two thousand cigarettes in unstamped or unlawfully stamped packages in the possession or under the control of any person The commissioner of taxation and finance, in his discretion, may remit all or part of such penalty.

B. Petitioners concede that they were in possession or control of the 329 cartons of assorted cigarettes all bearing counterfeit New York State and City cigarette tax stamps, as detailed in Finding of Fact “7”, which were confiscated by the Division’s investigators from petitioners’ rented truck. This concession is of no surprise since the evidence is overwhelming that such contraband was in their possession at the time of their arrest. Furthermore, as noted in Finding of Fact “8”, petitioners had no purchase documentation for the 329 cartons of cigarettes in their rented van in violation of Tax Law § 474(1) which provides as follows:

Every person who shall possess or transport any unstamped cigarettes upon the public highways, roads or streets of the state, shall be required to have in his

actual possession invoices or delivery tickets for such cigarettes. Such invoices or delivery tickets shall show the name and address of the consignor or seller, the name and address of the consignee or purchaser, the quantity and brands of the cigarettes transported, and the name and address of the person who has or shall assume the payment of the tax. The absence of such invoices or delivery tickets shall be prima facie evidence that such person is a dealer in the cigarettes in this state and subject to the provisions of this article.

C. The more complicated issue is whether petitioners were in possession or control of the 1,039.5 cartons of cigarettes bearing counterfeit stamps which the investigators found in the basement apartment in South Queens located at 131-20 95th Avenue. As noted in paragraph “14” above, the Division contends that petitioners are collaterally estopped from challenging the imposition of the subject penalties for the 1,039.5 cartons found in the basement apartment based upon their guilty pleas in their respective criminal proceedings. As detailed in Finding of Fact “11”, petitioners conceded that the charge, that on March 13th, 1997 at 8:30 in the evening at 121-30 95th Avenue in Queens they each were in possession of counterfeit tax stamps, was true. The Division and petitioners have various interpretations of this charge which was conceded as true in the criminal procedures. The Division maintains that possessing counterfeit tax stamps “at 121-30 95th Avenue in Queens” means possessing counterfeit tax stamps *in the basement apartment* at 121-30 95th Avenue in Queens. In contrast, petitioners maintain that what they conceded as true was their possession of counterfeit tax stamps in their rented van, which was outside of the house at 121-30 95th Avenue in Queens. It is concluded that the charge which they conceded was true was sufficiently vague so that petitioners are not collaterally estopped from contesting the issue whether they were in possession or control of the 1,039.5 cartons found in the basement apartment. (*cf.*, ***Kuriansky v. Professional Care***, 158 AD2d 897, 551 NYS2d 695).

D. A careful weighing of the evidence leads to the conclusion that petitioners were not in possession or control of the 1,039.5 cartons found in the basement apartment. Most important, as

noted in Finding of Fact “2”, Elsa Guzman, the owner-occupant of the two-family house at 131-20- 95th Avenue, did not know either one of the petitioners on the date at issue. Further, although the evidence suggests that petitioners were involved in moving the contraband to another location, it also suggests that they were being used by some other individual, namely Elvio Monegro, who may have paid the \$1,000.00 fine on their behalf. Consequently, although petitioners’ story that they were *merely purchasers* of cigarettes is rejected as full of holes,⁵ it may not be concluded that they were in possession or control of the 1,039.5 cartons found in the basement apartment. Mr. Cano’s testimony that he was fearful to identify Mr. Monegro to the investigators at the time of his arrest rings true and also explains his concocted cover story that he went to the basement apartment merely to purchase cigarettes at a slight discount.

E. Pursuant to Tax Law § 481(1)(b), as detailed in Conclusion of Law “A”, a penalty may be imposed of not more than \$100.00 for each carton (or fraction thereof) of unstamped or unlawfully stamped packages in the possession or under the control of any person in excess of 10 cartons. As noted in Finding of Fact “12”, a penalty of \$147,300.00 was asserted against each of the petitioners, which would equate to 1,473 unlawfully stamped cartons of cigarettes in excess of 10 such cartons. As noted in Finding of Fact “8”, petitioners were in possession of 329 cartons of unlawfully stamped cartons of cigarettes in their rented truck. Together with the 1,039.5 cartons of unlawfully stamped cartons of cigarettes in the basement apartment, the Division confiscated a total of 1,368.5 cartons of unlawfully stamped cartons of cigarettes as a

⁵ Petitioners’ contention that they were merely purchasers is farfetched. Petitioner Cano’s testimony that he intended to buy only 60 cartons of cigarettes but that Mr. Monegro pushed on him 269 cartons, which he “sold” to petitioner on credit, is not believable weighed against the fundamental facts concerning the incident at issue. Petitioners arrived on the scene at night in a rented vehicle on the very day the Division’s anonymous tip disclosed that the counterfeiting ring was going to be moving its operation. Further, petitioners filled up their truck to near capacity after making 10 trips from the basement to the rented truck in a brief 15 minutes after showing familiarity with how to proceed, i.e., open the gate, reverse up the driveway, park near the Bilko doors, and gain entrance through the Bilko doors. Moreover, petitioners had no purchase documentation for the cigarettes.

result of its break-up of the counterfeiting ring. If petitioners were held liable for the penalty at issue for all of the cigarettes confiscated, the maximum penalty under Tax Law § 481(1)(b) would be \$135,900.00.⁶ Neither the fact that the Division computed a slightly higher maximum penalty or utilized the date of March 1, 1997 instead of March 13, 1997 invalidates the statutory notices in light of no evidence of harm or prejudice to petitioners as a result of these defects (*Matter of Agosto v. Tax Commn.*, 68 NY2d 891, 508 NYS2d 934; *Matter of Pepsico, Inc. v. Bouchard*, 102 AD2d 1000, 477 NYS2d 892; *Matter of A & J Parking Corp.*, Tax Appeals Tribunal, April 9, 1992). Petitioners were well aware that the basis for the penalty asserted by the Division was the result of the seizure by investigators of illegally stamped cigarettes from their rented truck and from the basement apartment in South Queens.

F. Finally, this counterfeiting ring was an extensive operation, as reflected by the items confiscated in the search of the basement apartment. As noted by the investigator in Finding of Fact “10”, the stamps counterfeited by this ring were all over the New York City area. Consequently, in light of the conclusion that petitioners were participating in the movement of the counterfeiting ring’s inventory, a penalty of \$100.00 per carton based upon the 329 cartons of unlawfully stamped cigarettes confiscated from their rental truck, less 10, or \$31,900.00, may not be deemed excessive.

⁶ The total number of cartons confiscated was 1,368.5. Under Tax Law § 481(1)(b), 10 cartons would be subtracted, and applying a penalty of \$100.00 for each carton or fraction thereof results in a total penalty of \$135,900.00.

G. The petitions of Hilarion Cano and Taveras Santos are granted to the extent that the penalty asserted against each petitioner of \$147,300.00 is reduced to \$31,900.00, but, in all other respects are denied.

DATED: Troy, New York
October 4, 2001

/s/ Frank W. Barrie
ADMINISTRATIVE LAW JUDGE